Supreme Court, U.S.
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No. 01-522

IN THE

Supreme Court of the United States

SHEA ZELLWEGER and ALEIDA H. ZELLWEGER,

Petitioners,

v.

THE CITY OF ALLIANCE, OHIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FIFTH DISTRICT COURT OF APPEALS, STATE OF OHIO

REPLY BRIEF

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FURTHER REASONS FOR GRANTING THE WRIT

I. "PUBLIC USE" UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WAS NOT PRESENT WHEN THE PETITIONERS' PROPERTY WAS TAKEN BY THE RESPONDENT MUNICIPAL CORPORATION TO SATISFY A CONTRACTUAL OBLIGATION WITH A PRIVATE CORPORATE ENTITY.

The Respondent City, in its Brief in Opposition, continues to struggle with its expression of precisely what was the "public use" for which the Petitioners' home was taken through eminent domain. The best the Respondent can now suggest is that it was a "conceivable public purpose" to broadly provide for "public health." (Respondent's Brief, pp. 7-10). The Respondent City then fails to cite any case authority to support what has happened to Mr. and Mrs. Zellweger in the present case. That is because there is no authority, apart from the state court of appeals decision now under review, which holds that the taking of property, through eminent domain, for transfer to and use by a private hospital, passes muster under the Fifth Amendment to the United States Constitution.

The Respondent's Brief in Opposition ignores the decision of the Fifth District Court of Appeals for Ohio but instead incorrectly relies upon the judgment of the Common Pleas Court of Stark County, Ohio. The Fifth District Court of Appeals held that the City's utilization of eminent domain to improve the private hospital facilities was a "public use" and was a constitutional act. The state appellate court decision of "public use," based on Section 19, Article I, Ohio Constitution; Fifth Amendment and Fourteenth Amendment, U.S. Constitution, was not supported by its reliance upon *City of Huron v. Hanson*,

Erie App. No. E-99-060 (July 28, 2000); was not supported by the decisions as to a "public use" in *Gotsis v. Lorain Community Hospital*, 46 Ohio App. 2d 8 (1974) *and Davidson v. Youngstown Hosp. Assn.*, 19 Ohio App. 2d 246 (1969); and was not sustained by the factual differences present not only in *Berman v. Parker*, 348 U.S. 26, 99 L. Ed. 27 (1954) but also in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

When the Respondent City relies upon the findings of the Common Pleas Court of Stark County, Ohio, it has included matters which were never contained in the lower court's decision and has stretched other portions of the decision beyond the actual language employed. The trial court made specific findings that a blighted or slum area did not exist as to the area in which Petitioners' property was located. The Respondent city used its eminent domain powers for the purpose of urban renewal and urban redevelopment. A portion of the lower court's pertinent findings are quoted below:

Findings of Fact:

> 4. Resolution No, 15-99 (Defendant's Exhibit F and Plaintiff's Exhibit 8) was adopted by the Council of the City of Alliance on February 1, 1999. This resolution declares the necessity and intent to appropriate the real estate described in Exhibit "A", which lists 19 owners by name, address and brief legal description. The resolution states that the enumerated real estate is needed
>
> > for purposes of urban renewal and redevelopment, to create jobs and employment opportunities and to improve the economic welfare of the people, and

> specifically for the construction of a new and expanded health care facility in accordance with the Health Care Facility Development Plan which was adopted by Ordinance No. 119-98 Substitute.

The following Finding of Fact, which recites findings previously made, contains the following additional language:

> 7. Ordinance No. 118-99 (Plaintiff's Exhibit 9 and Defendant's Exhibit H) was enacted by the council of the City of Alliance on August 16, 1999. . . . The language of this ordinance restates in part what has been enumerated in Resolution No. 15-99 and Ordinance No. 119-98S and it specifically provides in Section 1 that the City is directed to proceed to obtain the real estate described in Exhibit "A", which includes all of defendants' real property and other real property, for purposes of urban renewal and redevelopment, to create and preserve jobs, "and specifically for the construction of a new and expanded hospital. . . .
>
> . . .
>
> 17. Counsel for the landowners in their cross examination of city officials asked them if they considered the area in question to be a blighted or slum area subject to urban renewal? Each of the officials answered in the negative and agreed with defendant's counsel that the area in question did not contain any condemned structures that needed to be razed.
>
> . . .

Conclusions of Law

> 10. This court acknowledges the fact that the Bruestle case originated under an urban redevelopment project and although there is no question, that the defendant's property or general area subject to the eminent domain proceedings by the City of Alliance for the hospital project is not a blighted or slum area, it is clear from the testimony by city officials that if the hospital abandoned its current site it would have a negative impact on the adjacent areas as to value.
>
> . . .
>
> In an urban renewal or urban redevelopment project the appropriating authority is authorized to transfer the assembled lands for streets, utilities, public housing, recreational facilities and schools, to name a few public uses, and to lease or sell lands to redevelopment companies for profit development.

(Petition, Appendix B).

The trial court throughout its findings indicated that the result would be an "economic boost to the area," and that there would be a modern, acute care hospital for the citizens of the city. (Respondent's Brief, p. 4). *While admitting* in Conclusion of Law 15 that the phrases "urban renewal" and "urban redevelopment" were used not only in Resolution No. 15-99 but also in Ordinance No. 118-99, the trial court concluded that they were "not a basis for renovation of a blighted area." Eminent domain has been expanded by a municipal council to determine who best can put the property to its most economical use.

In essence, the Respondent City argues that we weigh the Petitioners' home use on an economic scale against a private corporate development. It essentially replaces the constitutional rule of law and scales of justice with the scales of macro economics and then proceeds to suggest that the United States Supreme Court is without jurisdiction in such a matter.

The specific language of the Respondent's municipal council, not only in its Resolution of Necessity to Appropriate on February 1, 1999 – " . . . urban renewal and development . . . construction of a new and expanded health care facility" but also in its Ordinance to File Petition for Appropriation on August 16, 1999 – "urban renewal and development . . . for the construction of a new and expanded hospital," was declared by the Ohio appellate court as being "moot." In the decision of the Ohio Supreme Court in *State ex rel. Bruestle v. Rich*, 159 Ohio St. 13 (1953) and in this Court in *Berman v. Parker*, 348 U.S. 26, 99 L. Ed. 27 (1954), the "public use" basis under the Ohio and United States Constitution was held to be sustained where blighted or slum areas were to be eliminated. The need to show the existence of such blight or slum area is a precondition to the exercise of the constitutional power of eminent domain as determined in the above-cited cases. This precondition has not been met in the present case.

In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), this Court, in sustaining the decision of the Hawaii legislature that elimination of the evils related to land ownership by a small number of persons – referred to as "oligopoly," – was a "public use," held firm to its principal that the exercise of eminent domain power must be related to a public purpose:

> But where the exercise of the eminent domain power is rationally related to a conceivable public purpose,

> the Court has never held a compensated taking to be proscribed by the Public Use Clause. . . . (Citations omitted).

Id.

The Ohio Court of Appeals held that the absence of stated purpose of the municipal council was immaterial, so long as the matter involved facilities for the good of the Alliance public. The absence of a legitimate purpose by the Respondent's council clearly indicates that the legislative judgment of what constitutes a public use was without reasonable foundation even when equated by the Ohio court with the police power. Even a limited judicial review which this Court has said it will entertain in *Hawaii Housing* would indicate that the asserted public use by the Respondent City had no reasonable foundation in fact:

> In short, the Court has made clear it will not substitute its judgment for a legislative judgment as to what constitutes a public use "unless the use be palpably without reasonable foundation." (Citations omitted).

Id., pp. 240-243. There was no reasonable foundation in the present case.

Section 719.01, Ohio Revised Code, cited by the appellate court does not authorize a municipal corporation to exercise the power of eminent domain for compensation or a fee or to provide land to a private corporation. The Respondent City admits that "a sales agreement" for the hospital land was entered into "conditioned on the City's successfully conducting eminent domain proceedings to acquire properties necessary for the hospital redevelopment." (Respondent's Brief, p. 5). The Ohio Constitution, Article I, Section 19, requires that where private

property is taken for public use, compensation must be paid, and also Article XVIII, Section 3, requires that upon the exercise of the powers of local government, a municipality may not exercise its powers in conflict with the general law. The Respondent is a municipality which cannot exercise its powers in conflict with the general law – in this case, the Constitutions of Ohio and the United States and the general law of the Ohio General Assembly.

On such an important question of federal law as the scope of the "public use" limitation of the Fifth Amendment, the state court of appeals decision for which a writ of certiorari is sought should not stand as the case of first impression on the taking of property for a private hospital. This Court should not be satisfied that the taking of the Petitioners' home for the use and benefit of a privately-owned hospital in the present case satisfies the Fifth Amendment to the United States Constitution. No case law supports such an expansive holding. Because no case law supports the taking here, the Respondent City even resorts to reliance upon law outside of the context of eminent domain, to suggest that its "conceivable public purpose" should be reviewed by the judiciary under an "arbitrary or unreasonable" standard. [Respondent's Brief, p. 6; citing Appendix 36a - the trial court's Conclusion of Law ¶8 which refers to *State ex rel. Gordon, City Atty. v. Rhodes*, 156 Ohio St. 81 (1951)]. The *Gordon v. Rhodes* case involved an issue relating to municipal bonds and, thus, has no application in the context of eminent domain. More than some speculative, tangential or theoretical "economic boost" to public health must be required as the appropriate legal standard in cases such as this, where eminent domain is involved. Otherwise, it is difficult to conceive the purposes to which eminent domain power is limited.

II. PRINCIPLES GOVERNING REVIEW ON CERTIORARI ARE SATISFIED IN THIS CASE.

Petitioners respectfully submit that review of this case by this Honorable Court, on certiorari, is warranted under the general principles governing review on certiorari.

The review of this case is merited under U.S. Supreme Court Rule 10(c). A state court has ignored the established preconditions for "public use." The action allowed a citizen's home to be taken without a "public use" and solely to fulfill a contract benefitting a private corporation otherwise possessing no such power of eminent domain. Such action violates a fundamental right provided in the Fifth Amendment and applicable to state entities by the Fourteenth Amendment to the United States Constitution. There has been a total denial of the citizens' rights under the Constitution.

The reliance placed on *Neblett v. Carpenter*, 305 U.S. 297, 302 (1938) is misplaced as a basis for asserting that this Court has no jurisdiction. This Court held in *Neblett* that the holdings of the California courts concerned matters of state law and amounted at most to alleged erroneous construction of state statutes by its own court of last resort. Such decisions were not a denial of due process guaranteed by the Fourteenth Amendment. The situation in the present case is that the Ohio Fifth District Court of Appeals found that the Respondent's utilization of eminent domain to allow a private corporation to improve hospital facilities within the city was not an unconstitutional act. This presents a far different case for review, since the Fifth Amendment to the United States Constitution is directly involved here.

The Respondent's reliance upon U.S. Supreme Court Rule 12(b) is misplaced, inasmuch as the rule is improperly cited.

Petitioners have raised an important question involving the federal constitution as well as decisions made by this court so that jurisdiction on the writ of certiorari should be granted.

At all stages of this case, the Petitioners have presented their Fifth Amendment challenge to the utilization of eminent domain at issue here. The present case has the complete record and appropriate context to address the important issue of the application of the taking of private property when a public use is not involved.

CONCLUSION

WHEREFORE, the petitioners, Shea Zellweger and Aleida H. Zellweger, respectfully request this Court issue a writ of certiorari to review the judgment and opinion of the Ohio Fifth District Court of Appeals entered in this action on March 12, 2001.

Respectfully submitted,

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